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No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),

Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,

Defendant in Error,
(Plaintiff below).

REPLY BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

CURTIS H. LINDLEY,
HENRY EICKHOFF,
EMIL POHLI,
Attorneys for Plaintiff in Error.

CORRECTIONS OF, AND ADDITIONS TO, OPENING BRIEF FOR PLAINTIFF IN ERROR.

Upon a re-examination of its opening brief, the plaintiff in error finds that the subjoined corrections of, and additions to, the same should be made:

On page 23, after the word "varied" on line 7 add: * * * (Tr. of Record, pp. 13 and 14).

On page 27, after the word "said", at the end of the first paragraph add: (Tr. of Record, pp. 17 to 21).

On page 28, after the first quotation strike out the words: (Statement of Facts, pp. 6 and 7), and in lieu thereof insert: (Tr. of Record, top of page 19).

On page 29 at the end of the first quotation add: (Tr. of Record last line, p. 19 and lines 1 to 11, top of p. 20).

On page 29 strike out the words "possession" and "control" on the third line of the second quotation, and in the same quotation strike out the words "(statement of facts, pp. 7 and 12)" and in lieu thereof insert: (Tr. of Record, lines 1 to 7, top of p. 17).

On page 30, after the end of the first quotation, strike out the words "(statement of facts, pp. 2 and 3)" and in lieu thereof insert: (Tr. of Record, last three lines on p. 13 and first 7 lines, top p. 14).

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REPLY BRIEF FOR PLAINTIFF IN ERROR, CANADIAN PACIFIC RAILWAY COMPANY.

The brief of counsel for defendant in error concedes that "the whole case revolves upon the single question * * * whether the goods at the time of their destruction were in the possession of the defendant as a common carrier." Plaintiff asserts that they were so in the defendant's possession, and defendant asserts that they were not (see Brief of Defendant in Error, p. 7).

I.

This contention of counsel for defendant in error is based upon their assumption that the carriage involved in the case at bar was a shipment of the ordinary, usual character coming within purview of the rules of the common law and of the precedents, illustrating and applying the common law rules, which they cite. Proceeding upon this assumption, they declare (Brief of Defendant in Error, p. 11) that: "the goods were delivered to defendant as a common carrier for immediate transportation, prior to their destruction by fire", and that the goods were accepted by defendant as a common carrier for immediate transportation prior to their destruction by fire.

But this assumption is not warranted, but is clearly negatived by the case stated by the parties, which declares expressly and unequivocally:

> "It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company to receive at Antwerp, Belgium, *to the extent that such shipments could be received by any one at Antwerp pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium,* shipments of merchandise (like the one in controversy in this action) coming there in bond for export, pursuant and subject to said Treaty; * * * but it was his duty to *receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in Bond*

> *for export pursuant and subject to the terms of the International Treaty hereinafter referred to might be received by any one at Antwerp to be thence forwarded under and pursuant and subject to the provisions of said Treaty".*
>
> (Transcript, pp. 13 and 14.)

It is difficult to conceive of any language which could more clearly express the agreement, purpose and intent of the parties to deal, as best they could, with an unusual and new state of affairs, viz: a shipment *in bond in transit for export.* Such shipments were unknown to the common law and were not within the contemplation of the courts which rendered the opinions to which the Brief of Defendant in Error refers.

In drafting their case stated, the parties clearly understood the special situation involved and their exceptional relation, and they advisedly stipulated as a fact that it was the duty of Mr. Debenham, as agent for the Canadian Pacific Railway Co., to receive, at Antwerp, Belgium, the shipment under consideration, but only *to the extent that such shipments could be received by anyone at Antwerp,* subject to the International Treaty specified and the Belgian laws.

> "But it was his duty to receive and forward such shipments of merchandise as aforesaid *only to the extent and in the sense and in the manner according to which* shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter

> referred to *might be received by anyone* at Antwerp to be thence forwarded *under and pursuant and subject to the provisions of said* Treaty".
>
> (Transcript, pp. 13 and 14.)

We think it requires no argument to show that a shipment of merchandise which, coming in bond in transit for export to Antwerp, Belgium, is there received by a traffic agent

> "to the extent that such shipments could be received by anyone pursuant to the provisions of the International Treaty referred to and the Belgian Laws,"

was received by such traffic agent only in a qualified sense. The parties to this action expressly characterized and explained the function of the traffic agent in the case here involved by further declaring as to him:

But it was his duty to receive and forward the shipment of merchandise as aforesaid *only to the extent and in the sense and in the manner and under and pursuant and subject to the provisions of the treaty and the Belgian laws*—not in the absolute unqualified sense.

II.

NO QUESTION OF USAGE OR CUSTOM IS INVOLVED IN THIS CASE.

The case stated also does not show that the goods were delivered to and accepted by defendant ac-

cording to the custom and usage of the port of Antwerp or that there was any custom or usage relating to cases of the kind at Antwerp.

There is not a scintilla of evidence in the record relative to any custom or usage of any kind or place, nor would such evidence have been relevant or material in view of the facts disclosed by the case stated which legally excluded consideration of any custom or usage. The parties stated all the facts relevant to the shipment of merchandise under consideration, and these facts conclude the case.

The goods were *not* warehoused at the time of their destruction by fire solely for defendant's convenience, but were so warehoused in consequence of an ordinary exigency of traffic which was within the contemplation of the parties.

The case stated makes a clear showing on this point, as follows:

On May 20th, 1901, Debenham wrote to Oswald Roth:

> "Confirming mine of the 17th inst., I take pleasure in advising you that the Steamer 'Sardinian Prince' will sail on June 5th and I request you therefore to forward me the lot of cheese to Antwerp South Transit Station to arrive not later than June 3rd (1901)."
>
> (Transcript, p. 16.)

In reply to this note the shipment was forwarded so that it reached Antwerp on May 30th, 1901, *three days ahead of time.*

(Transcript, p. 18.)

This fact of itself precludes the claim that this delivery (such as it was) was for *immediate transportation.*

The steamer "Sardinian Prince" did not enter the port of Antwerp until noon on Saturday, June 1st, 1901, and did not begin loading her cargo until Monday, June 3rd, 1901.

Transcript, p. 21.

It was therefore necessary to leave the cheese in the custody of the Revenue Authorities of Belgium, for at least three days (from May 30th to June 3rd, 1901), and thereafter until the steamer was ready to embark it. This was not for the convenience of defendant, but occurred as an ordinary, usual incident of the kind of transportation provided for and contemplated by the parties, who acted advisedly in this regard too.

The showing made on this point by the case stated is as follows:

> "The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action. Plaintiff made arrangements from time to time with defendant, at the City of San Francisco, by the terms of which, pursuant and subject to the terms of the International Treaty afore-

said, and of the laws of the Kingdom of Belgium, *and not otherwise,* said Debenham, on behalf of defendant, was to receive and cause to be embarked at Antwerp, pursuant to the arrangements aforesaid, all the shipments of merchandise consigned to defendant for carriage from Antwerp to San Francisco, for an agreed rate of freight; and many shipments had been made under such arrangements prior to the shipment here in suit. The only term of the regular arrangements which was changed in the course of these numerous shipments was that the rate of freight charged by defendant at different times varied. In the regular course of business, and pursuant to the terms of the arrangements aforesaid, shipments had been from time to time received by said Debenham for plaintiff, as hereinabove set forth, forwarded to San Francisco, and delivered to plaintiff during five years preceding the shipment here in question".

(Transcript, pp. 14 and 15.)

It is to be noted that the plaintiff does not claim and the "case stated" does not show that the shipment was unduly delayed at Antwerp, or that plaintiff charged defendant with any negligence, or misconduct, by reason of its warehousing the shipment as appears, or otherwise in any regard. It does show that the parties had dealt with each other as in the transaction here involved during five years preceding the shipment in question substantially as in this instance, always contemplating such special arrangements and shipments (in bond in transit for export) as the one here involved. The burning of the bonded warehouse was not occasioned by any fault or negligence

of defendant (Transcript, page 22), yet plaintiff seeks to charge defendant with the extraordinary liability of an insurer.

We agree with the statement of defendant in error, found in its brief on page 7, that "the whole case revolves upon the single question, whether the goods, at the time of their destruction, were in the possession of the defendant as a common carrier".

The defendant in error has fixed the exact point of time, at which it claims the goods came into the possession of the plaintiff in error, viz: when the way bill was delivered to its agent Debenham.

(Brief of Defendant in Error, p. 41.)

Accepting that as the pivotal point of time, upon which turns the question of the passing of possession to the plaintiff in error, we contend:

III.

THAT THE POSSESSION OF THE GOODS IN QUESTION DID NOT AND COULD NOT PASS TO THE PLAINTIFF IN ERROR UNTIL THEY WERE ACTUALLY PHYSICALLY DELIVERED BY THE BELGIAN GOVERNMENT INTO THE HOLD OF THE SARDINIAN PRINCE, THE VESSEL WHICH WAS TO TRANSPORT THEM BEYOND THE CONFINES OF THE KINGDOM OF BELGIUM.

We maintain that the case now before the court should be viewed in the light of a new and peculiar state of facts, for which no precedent is to be found in the books, and which calls for a differentiation in principle and a change of the general rule.

Under the provisions of the International Treaty permitting transport of goods in bond in transit for export through the territories of the several sovereignties operating under it in contemplation, and subject to the provisions, of which treaty the contract of carriage in this case was entered into between the parties there was an *imperative* requirement that for the entire time during which the shipment was in transit in the Kingdom of Belgium—that is from the moment it crossed the Belgian frontier to the very point of time when it was actually, physically delivered on board the transporting vessel—it should remain "*uninterruptedly in the exclusive, official custody, possession and control of the customs authorities of the Kingdom of Belgium*" (Tr. of Record, pp. 19 and 20).

The contract of carriage involved in this case was entered into by all the parties concerned—the shipper, the carrier, plaintiff in error, and the importer, defendant in error—with full knowledge of this requirement, which became a part of the contract, and because of it, we maintain that the shipper was *powerless to deliver,* and the carrier, the plaintiff in error, was *equally powerless to receive* the possession and custody of the shipment, and could at best exercise but a qualified control of it, until the very moment when it was actually physically delivered by the Belgian government officials on board the vessel which was to transport it beyond the confines of the Kingdom of Belgium.

It is true that Debenham, the agent of the plaintiff in error was named in the waybill as the consignee of the goods, but he had at best but a partial control over them, the limits of which were defined as follows:

> "It was the duty of said W. H. Debenham, as such Continental Traffic Agent of the Canadian Pacific Railway Company, to receive at Antwerp, Belgium, to the extent that such shipment could be received by any one at Antwerp, pursuant and subject to the provisions of the International Treaty hereinafter specified, and the laws of the Kingdom of Belgium, shipments of merchandise (like the one in controversy in this action) coming there in bond for export, pursuant and subject to said Treaty, intended to be transported by said defendant carrier, and to give such directions to the Government authorities at Antwerp, Belgium, as was necessary to have such shipment of merchandise placed on board of steamers leaving Antwerp and connecting with defendant's railroad at Montreal, Canada; but it was his duty to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant to the provisions of said treaty."
>
> (Tr. of Record, pp. 13 and 14.)

In view of this stipulation it is disingenuous to suggest, as has been done by defendant in error (Brief for Defendant in Error, pp. 14 and 46), that

Debenham had the option of paying the charges and duties due the Belgian government on the shipment and thus reduce it to his possession unfettered from the exclusive possession and custody of the Belgian government prescribed by the bonding treaty.

Oswald Roth, the shipper, the Canadian Pacific Railway Company, the plaintiff in error, the carrier, and Wieland Bros., the purchaser, importer and real consignee of the goods, all the parties interested and acting in connection with the shipment, contracted with each other with a view of *carriage in bond,* and *not otherwise,* from the initial point of departure in Switzerland to the ultimate point of destination at San Francisco.

All that Debenham was authorized and empowered to do was:

1. To receive the way bill for the goods, which we submit, under the peculiar facts in this case was nothing more than a notification by the Belgian government officials that the goods had arrived at Antwerp.

2. To indicate to the Belgian government where it should keep the goods until delivery by it into the vessel, which was to transport them out of and beyond the Belgian territory.

3. To obtain a permit from the Belgian customs authorities to thus take them out of the Kingdom of Belgium.

Such was the actual situation, and all parties connected with the shipment knew and are presumed to have known the actual state of affairs.

Had Debenham adopted the course suggested by the defendant in error, he would have been acting in excess of his limited authority and in direct violation of the contract of carriage entered into by his principals, subject to which the seller and shipper of the goods forwarded them.

Furthermore if, as is maintained by the defendant in error, the mere delivery to and acceptance, by Debenham of the way bill was tantamount to a complete delivery of the goods, for and on behalf of his principal for immediate carriage, the liability of the latter as an insurer became fixed at that precise point of time, then we contend that it becomes immaterial at what place the goods were at the time they were destroyed, or whether some time intervened between their arrival at Antwerp and their being placed on board ship. If this view were correct the court would have to decide, as a matter of law, that, even, if the Sardinian Prince was at that very moment at the dock ready to receive the goods, and if Debenham had proceeded immediately to procure the "remise au depart", and in pursuance thereof had ordered the goods to the wharf alongside the deporting vessel in the very car in which they had arrived at Antwerp, and then were and if in that interval of time no matter how short the shipment had been destroyed, then the plaintiff in error is liable for them, notwithstanding the fact that Debenham, its agent, had not and could have nothing whatsoever to do with their safekeeping, or the manner of their

transportation from the railroad depot to the wharf, and was expressly denied any possession or custody of them.

To put the matter in another way: By reason of the express provisions of the International Treaty in pursuance of which the goods were shipped from Switzerland to the point of their deportation out of the Kingdom of Belgium, the *status* of these goods as to possession and custody at least, could not be altered by anything that the shipper in Switzerland, or the plaintiff in error in Antwerp, or the importer and buyer in San Francisco could do, from the moment of time when the car containing them was taken charge of by the Belgian government at the Belgian frontier at Sterpenich, until the very moment of time when they were put on board of the transporting vessel, and that *status* attached to them, as long as they remained in Antwerp, whether they were in the Royal warehouse or on the wharf to meet the exigencies of ocean carriage, or whether they were immediately transferred, from the railroad depot where they arrived in Antwerp, to the hold of the Sardinian Prince at the Ledegank dock. And we submit again that none of the parties concerned with the shipment could alter or change that *status* during that entire time, the provisions of the treaty referred to having by its express provisions, taken it out of their power to do so. From the correspondence of the parties (Transcript, p. 18), it appears that they understood the

goods could not be exported in any event before June 3, 1901. It is to be noted, nevertheless, that the goods arrived at Antwerp on May 30, 1901, three days before June 3, 1901. Upon their arrival the station authorities notified Mr. Debenham and delivered to him the way bill accompanying the shipment (Transcript, p. 18). Can it be contended that plaintiff in error thereupon immediately became liable as an insurer of the goods? If the goods had been burned in the warehouse between May 30 and June 3, 1901, would defendant be liable?

IV.

THE GOODS WERE IN CUSTODIA LEGIS FROM THEIR ENTRY INTO BELGIAN TERRITORY UNTIL THEIR DESTRUCTION.

Except for the provisions of the International treaty for the transportation of the shipment in bond in transit for export, the authorities of the Kingdom of Belgium would have seized the shipment immediately upon its arrival within their jurisdiction, and would have held the same until the lien of their Government for internal revenue charges upon the same had been paid.

Hartman v. Bean, 99 U. S. 393, 397.

As soon as the shipment was introduced or entered into Belgium, duties became payable on it to the Belgian Government and continued to be payable until the shipment was exported pursuant to the treaty.

U. S. v. Ehrgott, 182 Federal Rep. 272.

Under the provisions of the treaty referred to, the shipment might have been released from the lien which the Belgian Government had upon it, as security for the payment of taxes, only in one of two ways, viz.:

1. Either by actual payment of such taxes at Antwerp;

2. or by actual shipment of the goods pursuant to the provisions of the treaty out of the Kingdom of Belgium.

In either case the shipment was compelled to remain in the custody of the Government for the protection of its lien until one of these two conditions had been fulfilled.

Hartman v. Bean, supra.

There is no pretense or claim that any of the parties intended that the shipment should be released from the lien of the Belgian Government by actual payment of the revenue tax at Antwerp, and the case stated expressly affirms that the parties intended and agreed otherwise.

It conclusively appears, therefore, upon the case stated, that the shipment was compelled to remain in the custody of the Belgian Government, as security for the payment of its lien for taxes, until the shipment was actually sent out of its jurisdiction.

When the authorities of Belgium took the shipment at Sterpenich (the Belgian border), the

taking was equivalent to a *seizure* of the same and it was thereby placed in custody of the Belgian Sovereignty, as security for the payment of the Government lien thereon.

The summary proceedings which the customs officers were required to take against the goods were in the nature of proceedings *in rem* on the part of Belgium,

United States v. Cobb, 11 Federal Rep. 79,

and the Government warehouse was *an agency of the Government of Belgium,* and not like a free or private warehouse.

George v. Fourth National Bank of Louisville, 41 Federal Reporter 263.

The shipment, therefore, having been duly seized by the proper Belgian Government officials, as security for the payment of the lien of their Government for taxes, and the same having been duly deposited by them in the proper Government warehouse to secure such lien, was, at the time of its destruction, in custody of law.

> "Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector, in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after

deducting the usual rate of storage at the port, with all other charges and expenses including duties, were to be paid to the owner, importer, or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying the appropriate expenses."

Case No. 2831, 5 Federal Cases, p. 903.

"From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or controls that custody, is a virtual violation of the provisions of the act."

Case No. 7424, 13 Fed. Cases, p. 884. Citing and applying

Harris v. Dennie, (3 Peters) 28 U. S. 290, 304.

V.

THE CASES RELIED ON BY THE DEFENDANT IN ERROR.

We do not question the soundness of the legal principles laid down, and the conclusions reached, by the courts in the cases particularly relied on by defendant in error and specially cited and referred to in the appendix to its brief; but we deny their applicability to the case at bar, because, as

we contend, the case at bar presents an entirely new and special state of facts.

Three of the cases, however, do—one inferentially, and the other two directly—point to the conclusion that where a carrier has surrendered the custody and possession of freight carried by it to the sovereignty, i. e., the government customs officials, it is relieved from the insurance liability.

In the case of

> Pennsylvania Co. v. Canadian Pac. Ry. Co., 107 Ill. 386,

(Appendix to Brief of Defendant in Error, Case "C", p. viii), where the defendant was held liable for the loss of a shipment of oil which it had failed to deliver to the consignee, which it had stored in its own yard, and where it appeared that delivery could, in any event, not have been made by it until the customs duty was paid, the court, pointing out to the defendant how it could have escaped the common law liability as an insurer, at page 392, said:

> "If, as seems to have been the case, the governmental power, prevented the carriage of the oil to its destination until the duties were paid, then it was appellee's duty to take all practicable means to notify the consignees and failing in that to notify the shippers of the situation. *Meanwhile, appellee was at liberty to turn the oil over to the customs officers,* or to store it in a suitable and reasonably safe place."

From the language of the court the inference seems to be justified that if as a fact the railroad company had turned the shipment over to the

customs authorities, it would have exonerated itself from the insurance liability.

In the cases of

Parker v. North German Lloyd S. S. Co., 76 N. Y. 806

(Appendix to Brief of Defendant in Error, Case "D", p. xiii), and

Howell v. Grand Trunk Ry. Co., 36 N. Y. Supp. 544,

(Appendix to Brief for Defendant in Error, Case "E", p. xv), where the goods involved were destroyed while in the custody of the customs authorities, the carriers were held not liable as insurers.

And in the case of

C. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285,

(Brief for Defendant in Error, p. 55), cited and discussed in Pennsylvania Co. v. Canadian Pac. Ry. Co., *supra,* the defendant who carried bonded goods, was held liable because he *failed* to deliver them promptly into the possession of the customs officials.

In the case at bar we claim: That by reason of the International Treaty the shipper of the cheese in question, the agent of the buyer and importer (the Defendant in Error) was *compelled* to deliver it into the exclusive possession and custody of the Belgian government the moment it entered Belgian territory and that such possession and custody by that government *could not be divested,* irrespective of the question whether the goods were immediately

carried forward from the railroad depot at Antwerp upon their arrival there and placed on board the Sardinian Prince, or whether, they were temporarily held in storage—whether in the Royal Government warehouse or on the wharf—until the very moment they were placed in the hold of such vessel, and that not until then was the possession and custody and complete control of the goods delivered to the plaintiff in error and not until then did its liability as an insurer become fixed.

In the case of

Schieffelin v. Harvey, 6 John. 170, 5 Am. Dec. 206,

(Appendix to Brief of Defendant in Error, Case "F", p. xvii), the carrier was held liable as an insurer for the loss of the shipment, notwithstanding the fact that English customs officers were on board the vessel containing it, upon the distinct ground, as will appear from a careful reading of the following part of the decision of the court:

> "It is said that the nutmegs must have been stolen by the custom house officers, while they were on board the ship and had access to them in order to prevent them from being smuggled on shore. But this is no excuse. It was the duty of the master to guard against such accidents; and if he has neglected to do it, or been so unfortunate as not to detect the theft, if one was committed, he and not the shipper must bear the loss. This was one of the risks which he agreed to assume; and he must have known that some persons, in all probability, would be stationed on board, to guard against any attempt to run the goods, because such a precau-

tion was both reasonable and right. *The master was left in full control of the ship, and his control over her and her cargo, except as it related to the landing of the goods in question, was as complete as if the custom-house officers had not been on board.*"

There the carrier had complete physical possession and control of the shipment, whereas in the case at bar the possession never was and could not be in the carrier prior to the destruction of the shipment.

We respectfully submit that the judgment of the court below should be reversed.

Dated, San Francisco,
June 15, 1915.

Respectfully submitted,
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